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**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

 Plaintiff,

vs.

JAN ROUVEN FUECHTENER,

 Defendant.

Case No. 2:16-cr-00100-GMN-CWH

**GOVERNMENT'S MOTION TO
 EXCLUDE ALL EVIDENCE
 DERIVED FROM DROPBOX, INC.
 FOR SPOILATION**

COMES NOW the United States of America, by and through DANIEL G. BOGDEN, United States Attorney, and ELHAM ROOHANI and LISA CARTIER-GIROUX, Assistant United States Attorneys, and files this motion to exclude all evidence derived from Dropbox, Inc. for spoliation.

The Government subpoena sent to Dropbox early in this case after a Dropbox folder was found on one of the devices seized pursuant to the search warrant. The subpoena requested information on all accounts associated with the Defendant and his known email addresses. The subpoena was returned with no responsive returns. Thus, the Government

1 operated under the belief that the Defendant did not have a Dropbox account.

2 On July 12, 2016, Defense Counsel sent AUSA Cristina Silva an email containing
3 “Dropbox info,” including the user name and password to a Dropbox account, associated
4 with the Defendant. Defense Counsel indicated that there was an unreturned subpoena in
5 the Government’s discovery production, that he had “access” to the Dropbox account, and
6 that at least one folder had “illicit files.” The email also contained an image constituting
7 child pornography. That image included a caption that the Defendant was the last person
8 to have changed the file 6 months prior, when the Defendant would have been at liberty.
9

10 Based on the indication from defense counsel that the defendant’s Dropbox account
11 contained “illicit files,” and considering the nature of how the Dropbox application logs sign-
12 in attempts, Government agents could not access the account without potentially destroying
13 or inadvertently tampering with the evidence. Thus, upon receiving this information from
14 Defense Counsel, the Government sent a preservation request to Dropbox, sent a subpoena
15 requesting information on IP addresses that had accessed the account, and sought a sealed
16 search warrant to obtain what was in the account.¹

17 As the defense has not produced anything related to the Dropbox account save a
18 password, Government has not accessed the account. The Government, in following the
19 correct procedure to access the information, is still waiting for the search warrant return.
20 In short, the Government does not know what is in the account; thus, there has been no
21 reciprocal discovery.
22

23 ...

24 ¹ The search warrant is still sealed and the return has not been completed.

1 Furthermore, the returned subpoenas showed that since the Defendant's detention
2 related to this case, members of the defense team were accessing the Dropbox account on
3 numerous occasions from their homes and offices, in violation of 18 U.S.C. § 3509(m).²
4 Congress has clearly prescribed that child pornography related to a criminal proceeding
5 "shall remain in the care, custody, and control of either the Government or the court," and
6 that the defendant has no right to "copy, photograph, duplicate, or otherwise reproduce any
7 property or material that constitutes child pornography," "so long as the Government makes
8 the property or material reasonably available to the defendant." 18 U.S.C. § 3509(m).
9 Undoubtedly, if the Government does not have the material, it cannot make it available to
10 the Defendant. Therefore, in that case, the images would have to be in the "care, custody,
11 and control" of the court. *Id.* Here, the defense team has kept these images in their "care,
12 custody, and control" in violation of federal law.
13

14 If the defense team wanted access to the files without giving the Government
15 forewarning of any potential defense, the Defendant should have sought to preserve the
16 evidence first and then requested a copy of that evidence to be delivered to the court
17 pursuant to an *ex parte* Federal Rule of Criminal Procedure 17(c) subpoena, to ensure that
18 the contents of the Dropbox maintained their evidentiary integrity. The preservation
19 request would have been sufficient to authenticate the files for the purposes of trial.
20

21
22 ² The Government notes, as it did during the Calendar Call held on October 11, 2016,
23 that knowing access with intent to view child pornography is a crime under 18 U.S.C. §
24 2252A(a)(5)(B). The Government also confirms that no member of the defense team is
under investigation in the District of Nevada for any violations of 18 U.S.C. § 2252A or
18 U.S.C. § 3509, as related to their access of the Dropbox from various locations in this
case.

1 However, there is no indication that there was a preservation request sent by the defense
2 team.

3 The Court should exclude all evidence from the Dropbox account for the same reason
4 the Government cannot use any of this evidence – its integrity cannot be confirmed, and it
5 has been effectively spoiled. Had the tables been turned, and the Government sought to
6 proffer the evidence without a preservation order, the Government would be prevented from
7 using any of the evidence because it could not prove its authenticity. Without question,
8 authentication is a prerequisite to admissibility. *See United States v. Alvirez*, No. 11-10244,
9 2016 WL 4073312, at *6 (9th Cir. Aug. 1, 2016), as amended. “Authentication establishes
10 the genuineness of evidence and *is a special aspect of relevancy*. Evidence may be
11 authenticated by presenting testimony from an individual who has sufficient familiarity
12 with the proffered evidence to identify the evidence *and inform the court of the*
13 *circumstances under which the evidence was created*. In sum, the individual who
14 authenticates the evidence seeks to convince the court that the proffered evidence is
15 genuinely what it purports to be.” *Id.* (emphasis added).

17 As the Defendant is the proponent of the evidence, he bears the burden of
18 demonstrating that it is what it purports to be, it has not been tampered with or spoiled,
19 and that a person with actual knowledge can authenticate the exhibit. *Id.*; *see also* Fed. R.
20 Evid. 901. Essentially, the defense team cannot proffer the evidence through a member of
21 the defense team, because unless that person created the file or the account belonged to that
22 person, then they do not have the personal knowledge needed to authenticate the exhibits.
23 *See id.*

Respectfully submitted this 14th day of October, 2016.

/s/

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